

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1363

To be argued by
KENNETH V. HANDAL

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1363

UNITED STATES OF AMERICA,

Appellee,

—V.—

LUIS GONZALEZ,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

KENNETH V. HANDAL,
FREDERICK T. DAVIS,
*Assistant United States Attorneys
Of Counsel.*

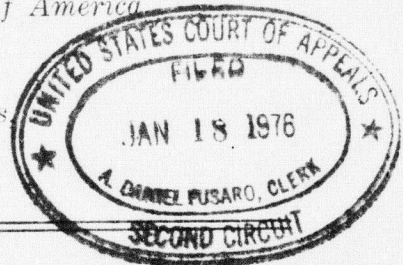




TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	2
A. The Government's Case	2
B. The Defense Case	5
ARGUMENT:	
POINT I—The Evidence Was Sufficient for the Jury to Find Gonzalez Guilty Beyond a Reasonable Doubt	5
POINT II—Gonzalez's Letter Was Not Constitution- ally Protected Free Speech	11
POINT III—The District Court's Instructions to the Jury Were Proper	14
A. The District Court's Charge on the Com- munication of a Threat Was Sufficient	14
B. The District Court's Modified "Allen" Charge Was Proper	16
POINT IV—The District Court Properly Refused to Appoint a Designated Substitute Counsel for Gonzalez	18
CONCLUSION	22

TABLE OF CASES

<i>Alexander v. United States</i> , 418 F.2d 1203 (D.C. Cir. 1969)	7, 11
<i>Bedrosian v. Mintz</i> , 518 F.2d 396 (2d Cir. 1975) ...	20

	PAGE
<i>Cantwell v. Connecticut</i> , 310 U.S. 296 (1940)	11-12
<i>Chaplinsky v. New Hampshire</i> , 315 U.S. 568 (1942)	12
<i>Glasser v. United States</i> , 315 U.S. 60 (1942)	6
<i>Landry v. Daley</i> , 280 F. Supp. 938 (N.D. Ill. 1968), rev'd on other grounds sub nom. <i>Boyle v. Landry</i> , 401 U.S. 77 (1971)	6
<i>LiPuma v. Commissioner</i> , 560 F.2d 84 (2d Cir.), cert. denied, — U.S. — (1977)	22
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964)	13
<i>Police Department of Chicago v. Mosely</i> , 408 U.S. 92 (1972)	12
<i>Ragansky v. United States</i> , 253 F. 643 (7th Cir. 1918)	6
<i>Rickenbacker v. Warden</i> , 550 F.2d 62 (2d Cir. 1976), cert. denied, — U.S. — (1977)	22
<i>Rogers v. United States</i> , 422 U.S. 35 (1975)	13
<i>Roy v. United States</i> , 416 F.2d 874 (9th Cir. 1969)	6, 10
<i>Stanley v. Georgia</i> , 394 U.S. 556 (1969)	12
<i>Tibbett v. Hand</i> , 294 F.2d 68 (10th Cir. 1961)	20
<i>United States v. Arlen</i> , 252 F.2d 491 (2d Cir. 1958)	20-21
<i>United States v. Barclay</i> , 452 F.2d 930 (8th Cir. 1971)	7
<i>United States v. Bentvena</i> , 319 F.2d 916 (2d Cir.), cert. denied sub nom. <i>Mirra v. United States</i> , 375 U.S. 940 (1963)	20
<i>United States v. Bermudez</i> , 526 F.2d 890 (2d Cir. 1975), cert. denied, 425 U.S. 970 (1976)	17
<i>United States v. Bohle</i> , 475 F.2d (2d Cir. 1973) ...	7

	PAGE
<i>United States v. Bozeman</i> , 495 F.2d 508 (5th Cir.), cert. denied, 422 U.S. 1044 (1975)	8
<i>United States v. Burkeen</i> , 355 F.2d 241 (6th Cir.), cert. denied, 384 U.S. 957 (1966)	20
<i>United States v. Cavallaro</i> , 553 F.2d 300 (2d Cir. 1977)	10
<i>United States v. Compton</i> , 428 F.2d 18 (2d Cir. 1970), cert. denied, 402 U.S. 1014 (1971) ...	6, 13
<i>United States v. Daley</i> , Dkt. No. 77-1262, slip op. 109 (2d Cir. October 20, 1977)	5-6
<i>United States v. Daulong</i> , 60 F. Supp. 235 (W.D. La. 1945)	8
<i>United States v. Falcone</i> , 554 F.2d 607 (2d Cir. 1976), cert. denied, 430 U.S. 916 (1977)	6
<i>United States v. Guillette</i> , 547 F.2d 743 (2d Cir. 1976)	14, 18
<i>United States v. Holder</i> , 302 F. Supp. 296 (D. Mont. 1969), aff'd, 427 F.2d 715 (9th Cir. 1970)	6, 8, 11
<i>United States v. Kelner</i> , 534 F.2d 1020 (2d Cir.), cert. denied, 429 U.S. 1022 (1976)	6, 9-10, 11-13, 16
<i>United States v. Lincoln</i> , 462 F.2d 1368 (6th Cir.), cert. denied, 409 U.S. 952 (1972)	6
<i>United States v. Magnano</i> , 543 F.2d 431 (2d Cir. 1976), cert. denied, 429 U.S. 1091 (1977) ...	17-18
<i>United States v. Maisonet</i> , 484 F.2d 1356 (4th Cir. 1973), cert. denied, 415 U.S. 933 (1974)	7, 10-11, 16
<i>United States ex rel. Martinez v. Thomas</i> , 526 F.2d 750 (2d Cir. 1975)	20
<i>United States v. Pfingst</i> , 477 F.2d 177 (2d Cir.), cert. denied, 412 U.S. 941 (1973)	7

	PAGE
<i>United States v. Poulack</i> , 556 F.2d 83 (1st Cir. 1977)	20
<i>United States v. Prochaska</i> , 222 F.2d 1 (7th Cir.), cert. denied, 350 U.S. 836 (1955)	13
<i>United States v. Reynolds</i> , 532 F.2d 1150 (9th Cir. 1976)	10
<i>United States v. Robinson</i> , 553 F.2d 429 (5th Cir. 1977)	20-21
<i>United States v. Robinson</i> , 560 F.2d 507 (2d Cir. 1977) (<i>en banc</i>)	17
<i>United States v. Rodriguez</i> , 545 F.2d 829 (2d Cir. 1976)	17
<i>United States v. Sears</i> , 544 F.2d 585 (2d Cir. 1976)	6, 18
<i>United States v. Terranova</i> , 309 F.2d 365 (2d Cir. 1962)	20
<i>United States v. Tortora</i> , 464 F.2d 1202 (2d Cir.), cert. denied sub nom. <i>Santoro v. United States</i> , 409 U.S. 1063 (1972)	20
<i>United States v. Tyers</i> , 487 F.2d 828 (2d Cir. 1973), cert. denied, 416 U.S. 971 (1974)	17
<i>United States v. White</i> , 451 F.2d 1225 (6th Cir. 1975)	20
<i>Watts v. United States</i> , 394 U.S. 705 (1969)	7, 11-12

OTHER AUTHORITIES

18 U.S.C. § 871(a)	7
18 U.S.C. § 875(c)	10
18 U.S.C. § 876	1, 10
Plan Under the Criminal Justice Act of 1964, As Amended to February 11, 1971, United States District Court, Southern District of New York	20

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-1363

UNITED STATES OF AMERICA,

Appellee,

—v.—

LUIS GONZALEZ,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Luis Gonzalez appeals from a judgment of conviction entered on August 22, 1977, in the United States District Court for the Southern District of New York, after a two-day trial before the Honorable Milton Pollack, United States District Judge, and a jury.

Indictment 77 Cr. 385, filed on May 20, 1977, charged Gonzalez in one count with causing to be delivered by the Postal Service a letter containing a threat to injure or kidnap the person of the addressee, Judge Edward Weinfeld, in violation of Title 18, United States Code, Section 876. Trial commenced before Judge Pollack on July 13, 1977, and concluded on July 15, 1977, when the jury found Gonzalez guilty.

On August 22, 1977, Judge Pollack sentenced Gonzalez to three years imprisonment.*

Statement of Facts

A. The Government's Case

The Government's evidence at trial established that on or about March 2, 1977, Gonzalez caused to be delivered by the United States Postal Service a letter addressed to Judge Weinfeld and that the letter contained a threat to do bodily injury to Judge Weinfeld.** In the letter, which was in Spanish, Gonzalez claimed that Judge Weinfeld had destroyed his life by sentencing him to prison in 1962.

Marie Vollrath, secretary to Judge Weinfeld, testified that in early March 1977, the Postal Service delivered an envelope containing the letter to Judge Weinfeld's chambers. (Tr. 12).*** The envelope, which was postmarked on March 2, 1977, was addressed to "Judge Weinfeld, US Court House, Foley Square, New York 10007," and showed a return address of 14-14 Hazen Street, East Elmhurst, N.Y. 11370. The return address is that of the House of Detention for Men on Riker's Island, a temporary detention facility for inmates awaiting trial and disposition of cases. (Tr. 70, 76; GX 1).

Vollrath brought the letter to Judge Weinfeld and told him that she would have it translated. (GX 2). She

* The sentence imposed is to be served consecutive to a state sentence Gonzalez is presently serving for bank robbery.

** At trial the Government did not contend that the letter contained a threat to kidnap Judge Weinfeld.

*** "Tr." refers to pages of the trial transcript; "GX" refers to Government Exhibits at trial; "Br." refers to defendant's brief on this appeal.

called the Clerk's Office of the United States District Court and arranged to have the letter translated. (Tr. 13). Juana Garcia, a Deputy Clerk who also acted as a translator for the Court, provided the following handwritten translation of the letter:

2/15/77

Dear Judge Weinfeld:

You have destroyed my life since you sentenced me to the Federal Jail, but don't worry I promise that you and I will meet soon to straighten this matter

You are an American dog with no compassion for his fellow man, but I will fix you.

I am going to remove you as Judge when I leave this prison that I am in because I'm going to do to you what no one else has.

You & your family will regret when I put my hands on you.

Attentively yours
Luis Gonzalez
349-973
Bloque 3 Seq.*

* The translation that Garcia prepared for Judge Weinfeld was handwritten and contained paragraphing and some additional punctuation that did not appear in the original letter. (Tr. 34-36). A typewritten translation of the letter, without the paragraphing and the punctuation, was also prepared, based on Garcia's translation, for use by the jury. (Tr. 40, GX 2A). Copies of both versions were given to the jury for the deliberations. (Tr. 154-155). The words "or send" were added at the end of the text of the typewritten version on the basis of Garcia's testimony that these words appeared in Spanish at the end of the letter. Garcia said that she had not included them in her original translation because they made no sense. (Tr. 39-40).

At trial Garcia described the letter as poorly written and poorly spelled. (Tr. 31-33, 36-37, 61; GX 3).

When Vollrath received Garcia's handwritten translation of the letter later that same day, Vollrath read it and gave it to Judge Weinfeld. Judge Weinfeld then asked her to call the Men's House of Detention on Riker's Island, which she did. She relayed the information she received to Judge Weinfeld. At Judge Weinfeld's instruction, Vollrath then called Robert B. Fiske, Jr., the United States Attorney for the Southern District of New York. Fiske and two agents of the Federal Bureau of Investigation met with Judge Weinfeld in his chambers later that day. (Tr. 13-18).

John Coleman, an Assistant Deputy Warden at the House of Detention for Men on Riker's Island, testified that Gonzalez was admitted to the prison on February 23, 1977, and was released on February 28, 1977. Coleman also testified that Gonzalez's prison number was 349-77-973 and that a common abbreviation of this prison number would be 349-973 (omitting "77" which indicates the year of admission), as appeared below the signature on the letter. Gonzalez was assigned to cell block number three, which also appeared on the letter. (Tr. 73-75; GX 6-7).

Coleman further testified concerning the procedures for prisoners' mail. Prisoners deposit their mail in "U.S. Mail" boxes in the cell blocks in which they are housed. The mail is then sent to the headquarters building on Riker's Island, where it is processed, postmarked and subsequently picked up by the Postal Service.* The

* The entire process takes from two to four days, thus explaining the lapse in time between Gonzalez's release on February 28, 1977, and the postmark date on the letter of March 2, 1977. (Tr. 80).

postage meter number on the envelope containing the letter to Judge Weinfeld was that of the postage machine at the prison headquarters. (Tr. 75-81).

Gonzalez's fingerprints were found on both the envelope and the letter. (Tr. 84-88). A judgment of conviction was introduced establishing that on January 26, 1962, Gonzalez was convicted of a crime upon his plea of guilty and was sentenced to two years imprisonment by Judge Weinfeld. (Tr. 67-68; GX 5).

B. The Defense Case

Gonzalez presented one witness. Dena Kohn, a Spanish interpreter, testified that a Spanish phrase in the middle of the letter that Garcia translated as "I will fix you" could also mean "I will fix it" and that the portion of the last line of the letter that Garcia translated as "when I put my hands on you" could also mean "when I get my hands on you." (Tr. 95-96, 99-100). Kohn also indicated that the punctuation and spelling of the letter were poor and that the context of the letter is not changed by adding punctuation. (Tr. 98, 102-103).

ARGUMENT

POINT I

The Evidence Was Sufficient for the Jury to Find Gonzalez Guilty Beyond a Reasonable Doubt.

Gonzalez's first argument is that the evidence at trial was insufficient to establish that he knowingly communicated a threat. Gonzalez's attempt to reargue the evidence on this appeal must be rejected. *See, e.g., United States v. Daley*, Dkt. No. 77-1262, slip op. 109, 116-117 (2d Cir.

October 20, 1977); *United States v. Sears*, 544 F.2d 585 (2d Cir. 1976). Viewing the evidence in the light most favorable to the Government, as this Court must, *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Falcone*, 544 F.2d 607, 610 (2d Cir. 1976), *cert. denied*, 430 U.S. 916 (1977), the jury could only conclude beyond a reasonable doubt that Gonzalez's letter was intended to communicate a threat to injure Judge Weinfeld.

The determination whether a particular communication is prohibited by Section 876 is made on the basis of an objective rather than a subjective standard. *See, e.g., United States v. Kelner*, 534 F.2d 1020 (2d Cir.), *cert. denied*, 429 U.S. 1022 (1976); *United States v. Holder*, 302 F. Supp. 296, 302 (D. Mont. 1969), *aff'd*, 427 F.2d 715 (9th Cir. 1970). A person making a statement that would be understood as a threat by a reasonable man in the position of the recipient is guilty of a violation of the statute, as long as that person intended to make the statement and knew the meaning of the words used. *See, e.g., Roy v. United States*, 416 F.2d 874, 377 (9th Cir. 1969); *Ragansky v. United States*, 253 F. 643 (7th Cir. 1918); *United States v. Kelner*, 534 F.2d 1020, 1027 (2d Cir.), *cert. denied*, 429 U.S. 1022 (1976); *United States v. Lincoln*, 462 F.2d 1368 (6th Cir.), *cert. denied*, 409 U.S. 952 (1972); *United States v. Compton*, 428 F.2d 18 (2d Cir. 1970), *cert. denied*, 401 U.S. 1014 (1971).^{*} Whether Gonzalez's letter contained a threat to injure was properly an issue for the jury to decide in the context of the language of the letter and the surrounding circum-

^{*} A threat is an "expression [which] in its context [has] a reasonable tendency to create apprehension that its originator will act according to its tenor." *Landry v. Daley*, 280 F. Supp. 938, 962 (N.D. Ill. 1968), *rev'd on other grounds sub nom. Boyle v. Landry*, 401 U.S. 77 (1971).

stances.* See, e.g., *United States v. Maisonet*, 484 F.2d 1356, 1358 (4th Cir. 1973), *cert. denied*, 415 U.S. 933 (1974); *Alexander v. United States*, 418 F.2d 1203 (D.C. Cir. 1969), and cases cited therein; *Watts v. United States*, 394 U.S. 705 (1969).**

Rather, the language used by Gonzalez is the language of physical confrontation: "I promise that you and I will

* Gonzalez's reliance on *United States v. Barclay*, 452 F.2d 930 (8th Cir. 1971), is misplaced. There a divided court held that the case should not have been submitted to the jury because the letter involved did not clearly convey a threat of injury. That letter was from the defendant to his attorney, the overwhelming portion of which dealt with a dispute between the two as to the course that should be taken with respect to the defendant's appeal on another conviction. Only five lines of the approximately sixty lines of the letter printed in the Federal Reporter could possibly have been construed as a threat. There was also no indication that the defendant was about to be released from jail.

Moreover, the court said that where the language of the letter is equally susceptible of two interpretations, the case should not be submitted to the jury unless the government presents evidence to remove that ambiguity. In this Circuit, however, where the facts equally support inferences of guilt beyond reasonable doubt or of innocence, the motion for acquittal must be denied. *United States v. Bohle*, 475 F.2d 872, 875 (2d Cir. 1973); *United States v. Pfingst*, 477 F.2d 177, 197 (2d Cir.), *cert. denied*, 412 U.S. 941 (1973). See also *United States v. Maisonet*, 484 F.2d 1356 (4th Cir. 1973), *cert. denied*, 415 U.S. 933 (1974).

** In *Watts v. United States*, 394 U.S. 705 (1969), the Court reversed the defendant's conviction for threatening the President of the United States, in violation of 18 U.S.C. 871(a). The Court held that it did "not see how [the defendant's asserted threat] could be interpreted otherwise" than as crude political opposition because it was expressly conditional, was made in public, and resulted in laughter from the listeners. *Id.* at 708. In contrast, the context in which Gonzalez privately wrote to Judge Weinfeld, and their prior relationship, does not compel the conclusion that this letter must be interpreted only as a crude method of stating that he would have Judge Weinfeld removed from office.

meet soon"; and "when I leave this prison." The seriousness of these statements is made more obvious by the fact that Gonzalez was released from prison shortly after the date on the letter and shortly before the postmark of the letter. Other expressions in the letter are similarly obvious in conveying the explicit threat of bodily harm. The admonitions "I will fix you," "I'm going to do to you what no one else has," and "You and your family will regret when I put my hands on you" eliminate any conceivable doubt that the threat was addressed to the *person* of Judge Weinfeld. These expressions take on particular significance when considered in the context that Gonzalez had been sentenced by Judge Weinfeld in 1962 to two years imprisonment, for which Gonzalez blamed Judge Weinfeld in the letter for having "destroyed" his life. Moreover, that the sentence was imposed some fifteen years prior to the writing of the letter would indicate that the statements constituted not an excited utterance, but a calm, cool statement of a threat. Thus, the letter, in the context in which it was written, convincingly expresses an intention of carrying out the stated threat.* *See United States v. Bozeman*, 495 F.2d 508 (5th Cir.), *cert. denied*, 422 U.S. 1044 (1975).**

* In *United States v. Daulong*, 60 F. Supp. 235 (W.D. La. 1945), cited by Gonzalez (Br. at 7), the court quashed the indictment because it found that, unlike the case at bar, there was no positive expression of intent.

** Gonzalez's contention that Judge Weinfeld's failure to install additional security devices somehow indicates failure to communicate a threat misses the mark. To violate the statute a threat need not have induced fear in the person to whom the letter is addressed; indeed, it need not even have reached the person. *See, e.g., United States v. Holder*, 302 F. Supp. 296 (D. Mont. 1969), *aff'd* 427 F. 715 (9th Cir. 1970). In any event, Judge Weinfeld's telephone calls immediately after reading the letter, to the Riker's Island prison and to the United States Attorney, and the subsequent meeting with the United States Attorney and two agents of the Federal Bureau of Investigation, certainly indicate the seriousness with which he treated the matter.

[Footnote continued on following page]

Gonzalez's contention that this letter sought Judge Weinfeld's impeachment and nothing more * is unfounded in view of the statements in the letter and the context in which they were made. This argument is based solely and exclusively on the use of the word "remove" in the translation of the Spanish verb "sacar", which could be translated by a number of other English words. (Tr. 101-102).** When the use of the word "remove" is considered in relation to the thoughts expressed in the letter, this Court cannot say "as a matter of law that [Gonzalez] was stating only ideas" regarding Judge Weinfeld's impeachment. See *United States v. Kelner*,

Gonzalez's claims in the footnote at page 8 of his brief regarding the prior attack on Judge Weinfeld by Judith Morgan are absurd. If the jury had been made aware of this episode, as Gonzalez suggests it should have been, the result would have been to indicate the seriousness of threats such as that by Gonzalez.

* In order to convict under the statute, the jury need not have found that the letter contained only threatening statements; it need only find that the statements were more than political or non-threatening. *United States v. Kelner*, 534 F.2d 1020, 1025, cert. denied, 429 U.S. 1022 (1976). Thus, even if the threatening statements in this letter are considered to be made in the midst of an expression of desire to have Judge Weinfeld impeached, the fact that the statements in the letter *include* an expression of an intention to inflict physical harm, suffices for conviction under Section 876.

** It is utterly inconceivable, as contended at trial and again on appeal (Br. at 6), that a "poor, illiterate, ignorant person," such as Gonzalez, who believed that a judge had "destroyed" his life, would write a letter such as this and have in mind no more than following the orderly constitutional processes to impeach the judge. This is not a case in which the defendant inartfully expressed his desire to engage in these processes; and the jury was clearly entitled to reject this claim when it was made at trial.

534 F.2d 1020, 1025 (2d Cir.), *cert. denied*, 429 U.S. 1022 (1976).*

Moreover, the defense that Gonzalez sought only Judge Weinfeld's removal as a United States District Judge was forcefully presented to the jury; the jury was entitled to reject Gonzalez's suggested alternative interpretation of the letter. As the Court has noted, "[t]he simple answer is that this argument was rejected by the jury, and the verdict was amply supported by the record." *United States v. Cavallaro*, 553 F.2d 300, 303 (2d Cir. 1977). See also *United States v. Reynolds*, 532 F.2d 1150 (7th Cir. 1976); *Roy v. United States*, 416 F.2d 874, 877 (9th Cir. 1969).**

* Judge Oakes's opinion in *Kelner*, which involved a similar statute, 18 U.S.C. § 875(c) (transmitting threats in interstate commerce), is entirely consistent with the jury's finding in this case. The four elements quoted from *Kelner* in defendant's brief (Br. at 5)—that the threat is unequivocal, unconditional, immediate and specific—were not meant to form the test for determining sufficiency of the evidence. Rather, these elements were stated as the basis for the determination whether the alleged threat is protected by the First Amendment—a question that "is properly for the court rather than the jury . . ." 534 F.2d at 1028.

** *United States v. Maisonet*, 484 F.2d 1356 (4th Cir. 1973), *cert. denied*, 415 U.S. 933 (1974), involved a situation quite analogous to the case at bar. In *Maisonet*, the court affirmed the defendant's conviction under Section 876 for writing a letter to a judge who had sentenced him to an indeterminate term of up to ten years. The letter said: "I may have to do all my ten (10) years, but if I ever get out of here and nothing happen to me while I am in here, you will never be able to be prejudice and racist against another Puerto Rican like me." The defendant testified that he did not intend to harm the judge; rather, he intended to seek the judge's removal from office. The court held that there was sufficient proof for the jury to find the defendant guilty beyond a reasonable doubt.

Gonzalez's attempts to distinguish *Maisonet* fail. In several significant aspects, the case at bar presents a more appropriate situation for the application of Section 876. Gonzalez's letter

[Footnote continued on following page]

POINT II

Gonzalez's Letter Was Not Constitutionally Protected Free Speech.

Gonzalez next contends that his statements in the letter to Judge Weinfeld were constitutionally protected free speech. This notion, that threats to inflict bodily harm on another are constitutionally protected free speech, has been consistently rejected in the decisions sustaining convictions under Section 876 and similar statutes. See, e.g., *United States v. Maisonet*, 484 F.2d 1356 (4th Cir. 1973), *cert. denied*, 415 U.S. 933 (1974); *United States v. Holder*, 302 F. Supp. 296 (D. Mont. 1969), *aff'd*, 427 F.2d 715 (9th Cir. 1970); *United States v. Kelner*, 534 F.2d 1020 (2d Cir.), *cert. denied*, 429 U.S. 1022 (1976); *Alexander v. United States*, 418 F.2d 1203, 1207 (D.C. Cir. 1969); *Watts v. United States*, 394 U.S. 705 (1969). See also *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940). It must also be rejected in this case.

As the Court said in *Watts*, "What is a threat must be distinguished from what is constitutionally protected speech." 394 U.S. at 707. The types of communications that cannot be punished under Section 876 consistent with the First Amendment are those that constitute an

to Judge Weinfeld, though not sent to Judge Weinfeld's home, as the letter in *Maisonet*, is certainly more explicitly menacing in its language and does refer to the Judge's family; and for the overwhelming part, Gonzalez's letter is not subject to an "equally plausible innocuous interpretation," as defendant contends. (Br. at 7). Moreover, the letter-writer in *Maisonet* was not about to be released from prison in the near future, as Gonzalez had been. Defendant's contention that *Maisonet* is distinguishable because Gonzalez's letter was written in Spanish is ridiculous; obviously, the defendant was more comfortable writing in his native language, Spanish, as indicated by the fact that an interpreter was present to interpret for him at trial. (Tr. 30). See also footnote ** at page 8, *supra*.

expression of ideas. Protected communications are those that can sensibly be characterized as no more than the mere "exposition of ideas", *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), or the "communication of information or opinion," *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940). See also *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *Stanley v. Georgia*, 394 U.S. 556, 564 (1969). Statements also may not be punishable under the statute if, when taken in context, they are not "true threats" because they are expressly conditional and are made in jest. *Watts v. United States*, 394 U.S. 705, 708 (1969).*

As the jury found below, Gonzalez's letter was not stating only ideas; the letter is an angry expression of an intention to inflict bodily injury. The statements in the letter are "true threats" of bodily harm, made in the context of Gonzalez's desire for revenge against Judge Weinfeld. They are not expressly conditioned on anything, and they certainly were not made in jest. See *Watts v. United States*, 394 U.S. 705, 708 (1969).

Gonzalez's statements constitute an unequivocal, unconditional, and immediate threat of personal injury against a specific person, and thus meet the test set forth by Judge Oakes in *Kelner* for determining whether a statute of the type involved here may properly be applied.** The language was unequivocal and unconditional: "I promise that you and I will meet soon"; "I will fix you"; and "when I put my hands on you." It

* Certainly, the defendant's threats fall within the concept of "fighting words" not protected by the First Amendment. See *Chaplinsky v. New Hampshire*, 315 U.S. 368, 572 (1942); *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940).

** Although this test has no precedential value since the two concurring opinions by Judge Mulligan and Judge Meskill did not concur in this test, the test set forth by Judge Oakes is met in this case.

was immediate: "will meet soon"; and "when I leave this prison." * It was specific as to its target, Judge Weinfeld: "You are an American dog"; "You and your family will regret."

Gonzalez's threats were explicit and unambiguous, and consequently fell within the constitutionally permissible scope of the statute. See *United States v. Kelner*, 534 F.2d 1020, 1028 (2d Cir.), cert. denied, 429 U.S. 1022 (1976). See also *Rogers v. United States*, 422 U.S. 35, 48 (1975) (Marshall, J., concurring); *United States v. Prochaska*, 222 F.2d 1 (7th Cir.), cert. denied, 350 U.S. 836 (1955). The protection of threats of bodily harm such as these would in no way contribute to "robust" "debate on public issues", see *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), since there was no form of debate and no public issues.** This was simply a private matter of revenge.***

* See also *United States v. Compton*, 428 F.2d 18 (2d Cir. 1970), cert. denied, 401 U.S. 1014 (1971). In *Kelner*, there was no evidence that Yasser Arafat, the target of the threat, was in New York, where the threat was made, or even in the United States, at the time of the threat or at the time of its telecast. 534 F.2d at 1021 n.2. See also Judge Mulligan's concurring opinion in *Kelner*, 534 F.2d at 1028.

** The phrase "when I put my hands on you" can in no sense be termed "political hyperbole." Moreover, the letter contained no allegation of the sort that Judge Weinfeld had been unfair to Gonzalez or that Judge Weinfeld was unfair to Hispanic persons. The letter simply said "You have destroyed my life."

*** Even if this letter is considered to include a statement seeking Judge Weinfeld's impeachment as a District Judge, the statute is constitutionally applicable. "Even where the threat is made in the midst of what may be other protected political expression, . . . the threat itself may affront such important social interests that it is punishable absent proof of a specific intent to carry it into action when the [four] criteria [set forth above] are satisfied." *United States v. Kelner*, 534 F.2d 1020, 1027 (2d Cir.), cert. denied, 429 U.S. 1022 (1976).

POINT III

The District Court's Instructions to the Jury Were Proper.

Gonzalez argues that his conviction should be reversed because of the cumulative effect of two asserted errors in Judge Pollack's instructions to the jury. First, Gonzalez claims that Judge Pollack insufficiently instructed the jury regarding the distinction between a serious threat and a statement of opinion. Second, Gonzalez argues that Judge Pollack's modified *Allen* charge was improper. Gonzalez's claims are frivolous.

A. The District Court's Charge on the Communication of a Threat Was Sufficient.

Gonzalez claims that Judge Pollack's failure to charge the jury concerning the First Amendment issues, in precisely the language used in the *Watts* opinion in the Supreme Court and that used in the jury charge in the *Kelner* trial, renders the instructions in this case inadequate. The argument is preposterous. Judge Pollack's charge more than adequately informed the jury concerning the distinction between a serious threat of injury and mere expression of opinion. See *United States v. Guille*, 547 F.2d 743 (2d Cir. 1976).

Judge Pollack charged that the Government must prove "that the defendant intended to and did communicate a threat of injury, one which could reasonably induce apprehension of bodily harm." (Tr. 143). Judge Pollack further charged that "[t]he threat must on its face and in the circumstances in which it was made be so unequivocal, unconditional and specific as to convey a gravity of purpose and an apparent intent of execution." (Tr. 143).

Clearly, Judge Pollack charged the substance of the "true threat" concept used in *Watts*, though admittedly he did not use the word "true." The jury was properly informed that "if the communication is not a threat of injury and is merely made in jest, or is expressly conditional, it is not punishable under the statute." (Tr. 144).

Moreover, Judge Pollack instructed the jury specifically with respect to the First Amendment issue in the case:

"Communications that execute merely expressions of ideas, information, opinion or even severe criticism are not punishable under this statute, consistent with the privilege of all of us of free speech under the First Amendment to the Constitution. Thus, if the communication was no more than the mere expression of ideas, information, opinion or severe criticism, the communication is protected by the freedom of speech preserved under the First Amendment." (Tr. 144).

These instructions, particularly when viewed in the context of the total charge, clearly conveyed to the jury the substance of the applicable law and Gonzalez's First Amendment claims.* In order to convict under the charge given, the jury had to find that the statements in the letter were not mere "expressions of ideas" or "severe criticism" ** and that they would "reasonably induce

* On this issue, Judge Pollack refused to instruct the jury exactly according to defendant's request in this connection, stating that "I view your request number eight as a spirited summation rather than as an instruction on the law." (Tr. 28).

** Moreover, the arguments of counsel for both the Government and Gonzalez consistently emphasized that the key issue for the jury's consideration was whether the letter contained a serious threat or sought merely Judge Weinfeld's removal from the bench. Defense counsel argued:

[Footnote continued on following page]

apprehension of bodily harm." (Tr. 143-144). The jury also had to find, according to the trial court's instructions, that Gonzalez "intentionally made threatening statements in the letter that showed an apparent determination to carry them into execution." (Tr. 145).^{*} Thus, Judge Pollack's charge was consistent with *Kelner* and the applicable case law.^{**}

B. The District Court's Modified "Allen" Charge Was Proper.

Gonzalez's claim that Judge Pollack's modified *Allen* charge was prejudicial is completely without merit. The charge, which was given in two parts—the second part after defense counsel objected to Judge Pollack's initial statement—contained no error.

Many of us might find that language strong, vituperative, offensive, coarse, call it what you want, but the important thing here is not whether the language is strong, not whether the language offends us, not whether the language puts us off into something we would or wouldn't use. The question here is whether the language executes a threat, a threat to do physical injury, an unequivocal threat to do physical injury, and I think that's what you have to look at and if it doesn't fall within that category, if it is not an unequivocal threat, then you can't return a verdict of guilty. (Tr. 122).

^{*} The only other asserted distinction between Judge Pollack's charge and the charge in *Kelner* is that Judge Owen in *Kelner* used the terms "political hyperbole" and "political opposition." (Br. at 11). First, this is a distinction without a difference since Judge Pollack used the terms "expressions of ideas", "opinion", and "severe criticism". Second, the nature of the situation in *Kelner* is more properly characterized as "political" than the statements in Gonzalez's letter.

^{**} Judge Pollack's instructions were, in substance, the same as those in *United States v. Maisonet*, 484 F.2d 1356, 1359 (4th Cir. 1973), *cert. denied*, 415 U.S. 933 (1974).

After less than two hours of deliberation, the jury indicated that it was deadlocked. Judge Pollack told the jury that it "is hardly enough time for me to say that you are in irreconcilable conflict." (Tr. 161). He instructed them "to discuss the case and your differences in an endeavor to see whether you can reasonably reconcile them." (Tr. 161-162). After defense counsel's objection, Judge Pollack further told the jury: "Your conscientious beliefs and personal decisions are not to be surrendered by any reconciliation of views. . . . You may ultimately wind up in irreconcilable conflict, but after discussing your respective views one may come to the view that the other is right or vice-versa." (Tr. 165). These instructions were clearly appropriate to encourage the jurors to pursue their deliberations toward a verdict. The charge "neither coerced the jury in its determination of the facts nor undermined the seriousness and conscientiousness with which it undertook them." See *United States v. Rodriguez*, 545 F.2d 829, 832 (2d Cir. 1976). See also *United States v. Robinson*, 560 F.2d 507, 517-18 (2d Cir. 1977) (*en banc*); *United States v. Bermudez*, 526 F.2d 89, 99-100 (2d Cir. 1975), *cert. denied*, 425 U.S. 970 (1976); *United States v. Tyers*, 487 F.2d 828, 832 (2d Cir. 1973), *cert. denied*, 416 U.S. 971 (1974).

While Judge Pollack did initially state that "[t]he statute deals with misuse of the mails"—which, of course, it does—he further instructed the jury, after defense counsel's objection: "And when I spoke of misuse of the mails, of course I was talking about the use of the mails to convey a threat of bodily injury." (Tr. 163, 166). This charge, read as a whole, was certainly not prejudicial to Gonzalez. See *United States v. Magnano*, 543 F.2d 431 (2d Cir. 1976), *cert. denied*, 429 U.S. 1091 (1977). Moreover, Judge Pollack neither stated nor implied that the jury was to disregard his earlier, comprehensive

instructions regarding what constituted a threat. *See United States v. Sears*, 544 F.2d 585 (2d Cir. 1976).*

POINT IV

The District Court Properly Refused to Appoint a Designated Substitute Counsel for Gonzalez.

Gonzalez's final point, that he was deprived of his right to court-appointed counsel of his choice, is frivolous. The District Court properly refused to appoint a particular substitute counsel for Gonzalez.

Trial of this case was scheduled to commence on July 11, 1977 before the Honorable Charles L. Brieant, Jr., United States District Judge for the Southern District of New York.** At a pretrial conference on July 7, 1977, Gonzalez's court-appointed attorney, Jack Lipson of the Legal Aid Society,*** sought to have Daniel Meyers appointed as substitute counsel for Gonzalez pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A. Mr. Lipson

* That Judge Pollack's modified *Allen* charge was given in two sections is of no consequence, for this charge is properly viewed as a whole and in the context of the trial court's entire instructions to the jury. Isolated improper comments, if any, do not compel reversal if the instructions are otherwise correct and nonprejudicial. *See, e.g., United States v. Guillette*, 547 F.2d 743 (2d Cir. 1976), and cases cited therein; *United States v. Magnano*, 543 F.2d 431 (2d Cir. 1976), *cert. denied*, 429 U.S. 1091 (1977).

** This trial date was set on June 30, 1977. Trial had previously been scheduled for June 20, 1977, a date which had been set on June 13, 1977. The earlier trial date was postponed when defense counsel moved on June 14, 1977 for examination of the defendant pursuant to 18 U.S.C. § 4244 and the application was granted.

*** Lipson was appointed as counsel for Gonzalez on May 26, 1977.

sought the substitute appointment on the grounds that he had had disagreements with Gonzalez concerning the conduct of the case and that Mr. Meyers had a greater familiarity with cases involving the First Amendment. (H. 4, 7).*

After a lengthy inquiry of both attorneys concerning the proposed substitution, Judge Brieant denied the application for substitution for three reasons: first, the trial date had been set, with adequate notice, within the sixty day period of the pilot program in the Southern District of New York under the Speedy Trial Act, in which Judge Brieant participates; second, Mr. Meyers was unavailable to try the case as substitute counsel until the end of July and, if he were appointed, trial could not commence as scheduled on July 11, 1977; and third, appointed counsel should not be selected by the defendant or by volunteering himself for a particular case. Judge Brieant also found that there had been no showing of a deep enough conflict to require a change of representation. (H. 5-6, 13, 15, 18-19).**

Subsequently, on July 11, 1977, Judge Brieant informed the parties that in order to commence the trial within the sixty day period, the case would be transferred to Judge Pollack because of specific scheduling difficulties. (Transcript of July 11, 1977, at 2-6). Trial commenced before Judge Pollack on July 13, 1977, a date within the sixty day period.

A criminal defendant has no absolute right to any particular counsel, whether the defendant seeks to have

* "H." refers to the pages of the transcript of this pretrial conference.

** Judge Brieant noted that at a previous pretrial conference, the defendant said that he was going to retain counsel and that Judge Brieant told him he could do so but that the trial date would not be changed. (H. 6).

that counsel appointed or to retain counsel of his choice. *United States v. Tortora*, 464 F.2d 1202, 1210 (2d Cir.), *cert. denied sub nom. Santoro v. United States*, 409 U.S. 1063 (1972); *United States v. Poulack*, 556 F.2d 83 (1st Cir. 1977). Specifically, the right of an accused to a court-appointed counsel does not carry with it the right to select a particular attorney. *Bedrosian v. Mintz*, 518 F.2d 396, 401 (2d Cir. 1975); *United States v. White*, 451 F.2d 1225 (6th Cir. 1975); *United States v. Robinson*, 553 F.2d 429 (5th Cir. 1977); *United States v. Burkeen*, 355 F.2d 241, 245 (6th Cir.), *cert. denied*, 384 U.S. 957 (1966); *Tibbett v. Hand*, 294 F.2d 68 (10th Cir. 1961). Judge Brieant acted properly in refusing to appoint a specific substitute counsel in this case. Indeed, his denial of defense counsel's application was in accordance with the Plan Under the Criminal Justice Act for the Southern District of New York, which provides that: "Counsel shall be designated and appointed by the [District Judge or Magistrate] and no person shall select his own counsel from the panel of attorneys or otherwise." *

Moreover, as Judge Brieant correctly found, the proposed substitution constituted "a lot of last minute manipulation" with the Court's trial calendar; and the unavailability of the proposed substitute counsel to commence the trial as scheduled would substantially interfere with the orderly administration of justice if the substitution were made. (H. 5-6, 8, 12-14, 18-19). See, e.g., *United States ex rel. Martinez v. Thomas*, 526 F.2d 750, 754 n.6 (2d Cir. 1975); *United States v. Bentvena*, 319 F.2d 916 (2d Cir.), *cert. denied sub nom. Mirra v. United States*, 375 U.S. 940 (1963); *United States v. Terranova*, 309 F.2d 365 (2d Cir. 1962); *United States v.*

* Sections IV.A.3 and IV.B.5 of the Plan Under the Criminal Justice Act of 1964, As Amended to February 11, 1971, United States District Court, Southern District of New York.

Arlen, 252 F.2d 491, 494 (2d Cir. 1958). Furthermore, as Judge Brieant found, no showing was made in the District Court of incompatibility between Mr. Lipson and Gonzalez. (Tr. 12, 16-19).^{*} Indeed, Judge Brieant suggested that Gonzalez proceed *pro se* or that another attorney from The Legal Aid Society try the case. The latter suggestion was specifically rejected; no response was made to the former. (H. 13, 15-16).

Finally, Gonzalez has shown no specific prejudice as a result of his representation at trial by Mr. Lipson. See *United States v. Robinson*, 533 F.2d 429 (5th Cir. 1977). Judge Brieant's refusal to appoint Mr. Meyers did not, as Gonzalez now asserts, deny him "his right to conduct a (political) defense . . ." (Br. at 15).^{**} Mr. Lipson ably and effectively prepared and presented the First Amendment defense discussed at the conference. (See, e.g., H. 7, 11; Tr. 5-8, 114-130). The suggestion that Mr. Meyers would have presented a better defense under the First Amendment is pure speculation and certainly does not meet the stringent standard in this Circuit for determining ineffective assistance of counsel.

^{*} When Judge Brieant asked at the July 7 conference for specific examples of Mr. Lipson's disagreements with Gonzalez, the only one that Mr. Lipson provided was that it was his "impression" that the defendant desired to testify in his own behalf and that he would advise the defendant not to do so. Judge Brieant pointed out that such a disagreement is quite common in criminal cases. (Tr. 16-19).

^{**} Gonzalez's contention on appeal that he was deprived of counsel of "his choice" is particularly suspect because the proposed substitution was not sought at the request of the defendant himself but was sought by his appointed counsel, Mr. Lipson. Mr. Lipson and Mr. Meyers, after discussing the case, were of the opinion that Mr. Meyers could better handle the case. (H. 8, 10, 15). As Mr. Lipson stated at the July 7 conference, at which Gonzalez was present: "Your Honor, this is not a situation where Mr. Gonzalez sought to choose his own attorney." (H. 8). See also H. 15.

See, e.g., LiPuma v. Commissioner, 560 F.2d 84, 88, 90 (2d Cir.), *cert. denied*, — U.S. — (1977); *Rickenbacker v. Warden*, 550 F.2d 62 (2d Cir. 1976), *cert. denied*, — U.S. — (1977).*

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

KENNETH V. HANDAL,
FREDERICK T. DAVIS,
*Assistant United States Attorneys,
Of Counsel.*

* As set forth in the cited cases and numerous others in this Circuit, it is only when counsel's performance may be considered so woefully inadequate as to shock the conscience of the Court and make the proceedings a farce and mockery of justice, that a denial of effective assistance of counsel will be found.

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

KENNETH V. HANDAL being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the 18th day of January, 1978,
he served ^{two copies} ~~a copy~~ of the within brief by placing the same
in a properly postpaid franked envelope addressed:

WILLIAM J. STUTMAN, ESQ.
233 Spring Street
New York, New York 10013

And deponent further says that he sealed the said envelope
and placed the same in the mail box for mailing at One St.
Andrew's Plaza, Borough of Manhattan, City of New York.

Sworn to before me this

Kenneth V. Handal
KENNETH V. HANDAL
Assistant United States Attorney

18th day of January 1978
Maria A. Israelian
MARIA A. ISRAELIAN
Notary Public, State of New York
No. 31-4521851
Qualified in New York County
Term Expires March 30, 1978

